**Marriott Corporation *and* Hospital and Service Employees Union Local 399, Service Employees International Union.** Case 31–CA–19652

February 28, 1994

## DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS DEVANEY AND TRUESDALE

On August 17, 1993, Administrative Law Judge David G. Heilbrun issued the attached decision. The General Counsel filed exceptions and a supporting brief, and the Respondent filed an answering brief.

The National Labor Relations Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions and to adopt the recommended Order as modified and set forth in full below.

No exceptions were filed to the judge's finding that the Respondent's employee handbook contained a rule unlawfully prohibiting its employees at the Los Angles County Museum of Art from wearing union insignia on their attire. The General Counsel, however, excepts to the judge's failure to order the Respondent to rescind the unlawful prohibition against wearing union insignia at its Los Angeles County Museum of Art location and to publicize the rescission at that facility to the same extent that the unlawful rule was publicized there. The General Counsel also excepts to the judge's failure to include in the notice to employees the Board's customary language setting forth employee rights under the Act. We find merit in these exceptions and shall modify the recommended Order accordingly.

The General Counsel further excepts to the judge's failure to require the Respondent to rescind the unlawful prohibition at all the Respondent's facilities where the unlawful rule was promulgated and maintained, and to the judge's failure to require the Respondent to post appropriate notices to employees at all those locations. We find no merit in this exception.

In the proceeding before the judge, the General Counsel did not allege in the complaint that the Respondent promulgated and maintained an unlawful rule at other facilities or in any other manner seek an order applying to all facilities where the unlawful rule may have been promulgated and maintained. The record contains no evidence that the rule applied at any other locations. The General Counsel asserts in his brief that it ''appears that the Handbook has wide application beyond those employed at the Los Angeles County Museum of Art.'' While it is true that a reading of the handbook suggests that its application is not limited geographically in any way, its ''appearance'' to the General Counsel or the Board cannot substitute for proof.

A Board order must be supported by evidence that there are violations to be remedied. See Section 10(c) of the Act. Given the absence of any evidence, finding, or stipulation that the unlawful rule was promulgated or maintained at any other of the Respondent's facilities, we find that the issue of more widespread violations was not fully litigated.[1]

In these circumstances, we find that an order extending to other Respondent facilities would deny the Respondent due process by not allowing it to show the limits of the application of the handbook containing the rule or otherwise defend against the necessity for such a broad order.[2] Accordingly, we adopt the judge's limitation of the remedial order to the one location at which a violation was alleged and litigated in this proceeding.

## ORDER

The National Labor Relations Board orders that the Respondent, Marriott Corporation, Los Angeles, California, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Promulgating and maintaining its rule prohibiting employees from wearing union buttons or insignia.

(b) Interrogating employees about conversations among union representatives and employees.

(c) Verbally promulgating an overly broad no-solicitation rule against talking among employees at work.

(d) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed under Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Rescind its rule contained in its employee handbook prohibiting employees at the Los Angles County Museum of Art from wearing union buttons or insignia and notify employees that the rule has been rescinded to the same extent that the unlawful rule was publicized at that location.

(b) Post at its Los Angeles County Museum of Art premises in Los Angeles, California, copies of the attached notice marked ''Appendix.''[3] Copies of the no-

[1] *Raley's*, 311 NLRB 1244 (1993), on which the General Counsel relies, is distinguishable. In *Raley's*, the broad remedy was based on the judge's finding, to which the Respondent did not except, that the respondent's unlawful dress code rule ''applied to its employees at all its stores.'' In the instant case, as noted above, the judge made no finding that the Respondent's rule applied to any facility other than the Los Angeles County Museum of Art.

[2] For example, had the issue been timely raised, the Respondent would have been entitled to show the existence of special circumstances justifying the rule at particular locations.

[3] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''

tice, on forms provided by the Regional Director for Region 31, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately on receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

## APPENDIX

### NOTICE TO EMPLOYEES
### POSTED BY ORDER OF THE
### NATIONAL LABOR RELATIONS BOARD
### An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

> To organize
>
> To form, join, or assist any union
>
> To bargain collectively through representatives of their own choice
>
> To act together for other mutual aid or protection
>
> To choose not to engage in any of these protected concerted activities.

One of the rights guaranteed to employees by Section 7 of the National Labor Relations Act is the right to wear union buttons or insignia free from employer prohibition or restriction absent special circumstances requiring such regulation for the preservation of discipline in the employer's establishment.

WE WILL NOT promulgate and maintain a rule prohibiting employees from wearing union buttons or insignia.

WE WILL NOT interrogate employees about conversations among union representatives and employees.

WE WILL NOT verbally promulgate an overly broad no-solicitation rule against talking among employees at work.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed under Section 7 of the Act.

WE WILL rescind our unlawful rule contained in the employee handbook prohibiting you from wearing union buttons or insignia and notify you that the rule has been rescinded to the same extent that the unlawful rule was publicized.

### MARRIOTT CORPORATION

*Ann L. Weinman, Esq.*, for the General Counsel.
*Michael C. Ford* and *Carlton J. Trosclair*, of Bethesda, Maryland, for the Respondent.
*Jono Shaffer*, of Los Angeles, California, for the Charging Party.

## DECISION

### STATEMENT OF THE CASE

DAVID G. HEILBRUN, Administrative Law Judge. This case was tried at Los Angeles, California, on May 19, 1993. The charge was filed by Hospital and Service Employees Union Local 399, Service Employees International Union (the Union) on November 27, 1992, and the complaint was issued on February 26, 1993. The primary issue is whether Marriott Corporation (Respondent) prohibited discussion among employees about the Union and interrogated an employee concerning union conversation, while maintaining a written rule against the wearing of insignia, in violation of Section 8(a)(1) of the National Labor Relations Act.

On the entire record, including my observation of the demeanor of witnesses, and on consideration of briefs filed by the General Counsel and Respondent, I make the following

### FINDINGS OF FACT

#### I. JURISDICTION

Respondent is a Delaware corporation having an office and place of business in Los Angeles, California, where it is engaged in providing janitorial services to commercial and governmental buildings. In the course and conduct of its business operations, Respondent annually derives gross revenues in excess of $500,000, while purchasing and receiving goods and services valued in excess of $50,000 at its Los Angeles, California location directly from points outside the State of California. Respondent admits, and I find, that it is an employer within the meaning of Section 2(2), (6), and (7) of the Act and, as also admitted, that the Union is a labor organization within the meaning of Section 2(5) of the Act.

#### II. ALLEGED UNFAIR LABOR PRACTICES

##### A. *Case Summary*

In approximately May 1992, the Union began organizing activity among employees at the Los Angeles County Museum of Art (LACMA), where events of the case occurred. In the weeks following, a supervisor allegedly made remarks to certain janitorial employees which inquired about this activity and ordered employees to hold any discussion concerning the Union outside museum premises. Later a meeting of employees was held at which a supervisor read aloud an employee manual provision limiting the wearing of buttons in a way that would forbid union insignia.

B. *Operative Facts*

This setting is one of Respondent's many unionized accounts. As an adjunct to what LACMA comprises as a public art museum, consisting of five buildings and an adjoining plaza, Respondent provides categorical services using over two dozen hourly paid custodial employees. A descriptive breakdown of such functions is: (1) housekeeping, (2) construction cleanup, (3) special events, and (4) technical services. Ordinarily LACMA is open from 10 a.m. to 5 p.m. while Respondent's janitors are spread over a staggered day shift that for some begins at 6 a.m. Public contact between museum patrons and Respondent's employees occurs randomly during cleaning work in the galleries or as necessary to supply and dismantle exhibits. Additionally a few employees would experience close public contact while doing setups or takedowns for special events such as parties that might draw hundreds of attendees.

Respondent maintains an employee manual titled, '' Facilities Management Associate Handbook.'' Among its rules and regulations are one regarding personal appearance in which is stated, ''Buttons—Service or Safety Committee award pins only, to be worn on the left collar,'' and one expressed as a standard no-distribution/no-solicitation limitation. Exact phrasing of the latter rule begins as follows:

> The Company stresses that its associates should not be disturbed or disrupted in performing their job by solicitations. For that reason, the following rule has been established:
>
> Solicitation of associates during working time by, or on behalf of, any individual organization, club or society is prohibited. The distribution of any literature, pamphlets, or other material in a Company work area is prohibited. This means that associates may not solicit while they are engaged in the performance of work tasks, nor may associates be solicited while working.

On approximately July 1, Corporate Manager of Employee Relations Carlos Cartaya held a meeting of janitorial employees at which time he stated the Employer was aware organizing efforts were under way among employees at LACMA, and that Respondent intended to resist this to the extent allowed by law.[1] Subsequently on July 27, Supervisor Martha Martinez and her assistant held at least one meeting of assembled janitors to emphasize certain provisions of the employee manual. Management's purpose was expressed in both English and Spanish to those present, with the prohibition against buttons or insignia ''other than Marriott's'' pointed to, and employees reminded that they did not work under any employment contract protecting them from sudden dismissal. The next day Martha Martinez repeated this information directly to persons who had missed the group meeting because of having that day off.

Allegations of the complaint also concerned two brief incidents occurring on the premises during the time following commencement of union activities. Jorge Salay is one of the janitors at LACMA, and attended several organizational meetings conducted at an adjoining park by Union Representative Rocio Saenz. On a day in August, Salay was working in proximity to Gladys Rodriguez while cleaning plexiglass in the Anderson building and the other employee vacuumed. The two were diverted by a vacuum cleaner malfunction which Salay briefly attempted to adjust, and in those immediate moments Martha Martinez approached them. Salay testified that he overheard Martha Martinez inquire of Rodriguez by asking, '' what does the Union girl say?'' Martha Martinez denied making any remark of this kind.

On a separate occasion during July, janitor Hugo Martinez was engaged in conversation at the loading dock with nearby coworker Nelson Valladares. It was late morning and Hugo Martinez was telling Valladares about a delegation of persons that had recently attempted to discuss employee issues with officials of the museum itself. Valladares had not participated in the delegation, about which Hugo Martinez was better informed. In fact Hugo Martinez had been mildly involved with other employees in support of the Union's organizing drive. As the two of them spoke about the delegation, Martha Martinez approached and said if they wished to discuss union matters to ''do it outside.'' Martha Martinez, as above, similarly denied making any remarks of this kind.

C. *Discussion*

The first issue I treat is whether Respondent's written rule about buttons is unlawful as the General Counsel contends. A fundamental right of employees to wear union insignia while working as a form of expression has protection under Section 7 of the Act. *Republic Aviation Corp. v. NLRB*, 324 U.S. 793, 801–803 (1945). The right to protest in words or display opinion-revealing insignia, where in either case the basis is unionism or considerations of working conditions, is not to be impeded by an employer absent special circumstances. *Southern California Edison Co*., 274 NLRB 1121 (1985); *Borman's, Inc*., 254 NLRB 1023 (1981).

I believe the General Counsel has a more correct analysis of this issue, based on the composite of rationale found in *Control Services*, 303 NLRB 481 (1991); and *Albertsons, Inc*., 300 NLRB 1013 (1990). Respondent has primarily argued that (1) no compulsion against wearing union insignia has been shown, (2) disparate application of the button rule is not present, and (3) the extensive public access to LACMA constitutes requisite ''special circumstances'' to justify its button policy. Although the General Counsel has stipulated that no employee was told not to wear a union button, or to remove one being worn, that does not diminish the impact of a plain written rule of conduct at the workplace which excludes insignia in support of the Union from what is allowable behavior. If the fundamental right exists as *Republic Aviation Corp*. guarantees, the mere existence of a limiting rule of employee conduct is in contravention of law. Thus it is unavailing for Respondent to point out that no employee was verbally cautioned against doing what the established employee rule forbids, or that any person testing the rule was ordered to stop. It is instead that the rule was embedded in overall rules of conduct, and the reemphasis of this prohibition by Martha Martinez as done in July makes its effect even more significant.

As to absence of any showing of disparate application this does not detract from the impermissible maintenance of the button rule in the first place. It is not a disparity that is alleged, but as the parties themselves in their briefs refer to

[1] All dates and named months hereafter are in 1992, unless otherwise indicated.

the issue of whether a rule is in violation of the Act, ''on its face,'' or is ''overbroad,'' respectively.

The matter of public access in this fact situation does not provide Respondent with the special circumstances necessary to inhibit the wearing of union insignia. Granted that the janitorial employees would come in contact with a museum-attending public on a range from random to frequent, I see nothing about that fact which would justify the rule. Neither is it apparent that special events at which janitorial employees might have more extensive public contact would change an outlook on this branch of what Respondent contends. There is no unique sensitivity that arises from employees of a cultural facility displaying insignia which show support for collective representation. Such a display does not have the potential to distract, disturb, or otherwise inconvenience art patrons, whose presence is the essential reason for the facility being served.

The issue raised from testimony of Salay requires a preliminary credibility resolution, and beyond that a holding in terms of what inquiry is permitted in the brief episode that the General Counsel's witness described. At the outset I credit Salay, who displayed good demeanor and impressively appeared to testify honestly. He showed ability at recalling details, and a persuasive consistency in responding to questions as they unfolded during his examination. I discredit Martha Martinez, whose demeanor was far less convincing, and whose denial concerning the issue was flat and insincere-sounding coupled with my doubts because of the brief and shallow manner in which she was questioned on the point. Taking then as accepted fact of the matter that Martha Martinez abruptly asked Rodriguez what was being told to her by the female union representative, I hold this to be unlawful interrogation under the circumstances. The union activities by this time had been plainly visible to supervisory personnel in the park across from LACMA, and Martha Martinez had actually altered her lunch practices to better avoid seeming close to these activities. However, the direct issue is whether she could suddenly confront Rodriguez with a question as I credit was made. Although Respondent developed on the record that it had instructed supervisors against unlawful interrogation, the point remains whether the credited remark constituted just such a violation. I believe so based on the established fact that Rodriguez was not for any reason known to be an active and open supporter of the Union, and thus by an objective standard was coerced by this sudden questioning. See *Rossmore House*, 269 NLRB 1176 (1984). Respondent's most appealing avenue of exoneration here is the discussion by a divided Board in *Sunnyvale Medical Clinic*, 277 NLRB 1217 (1985). In that case the basic ''all-of-the-circumstances'' test of *Blue Flash Express, Inc.*, 109 NLRB 591 (1954), was treated; however, the majority found the questioned employee, although not openly and actively supportive of a labor organization, had presented a dues-authorization card directly to a personnel director. This fact, coupled with absence of employer hostility to that union, the general, nonthreatening nature of the questions and a casual, amicable type of conversation based on personal friendship left the overall episode devoid of such elements of coercion as would be necessary to find a violation of the Act. I distinguish the facts of *Sunnyvale* from what is present here, largely because the overall circumstances show an alarmingly unconnected inquiry that in its literal terms called for a disclosure of all that was of interest to the employee in her attendance at organizing meetings. It is just such intrusive interrogation that the *Blue Flash* doctrine intends to prevent, and on these grounds I hold Martha Martinez' action to be a violation of Section 8(a)(1) as alleged. In reaching this conclusion, I take into account Respondent's argument that Rodriguez was not herself called as a witness, but do not find a sufficient basis to make an adverse inference for the General Counsel's failure to call this person or explain why it was not done. The drawing or nondrawing of requested inferences as sought by Respondent here, and on the incident to be next discussed, is an exercise in the use of reasonable discretion. Within this context I chose to excuse the General Counsel's presentation on both issues. So doing reflects my satisfaction that the quality of testimony establishing these two independent violations is ample on the points involved. See *Laborers Local 190 (ACMAT Corp.)*, 306 NLRB 93 (1992).

The incident about which Hugo Martinez testified deals with another aspect of employer response to an organizing campaign. Here the issue is whether a brief verbal edict, even if mistakenly based on the belief that solicitation between employees was taking place, is actionable where the employees are directed to go off premises. My credibility evaluations as to this incident again favor the General Counsel. Although Hugo Martinez was not as convincing a witness as Salay, his demeanor was sufficiently enough so to warrant being credited. This is true even though he exhibited some perplexed hesitancy at times, but not so much in kind or quality as to appear he was actually slanting his testimony. Relatedly, I again discredit Martha Martinez' hollow-sounding denial of ever having made remarks as attributed to her by Hugo Martinez. From this the question becomes that of whether ordering two employees to go outside the premises for discussion of what was not a solicitation connected to the Union's organizing campaign violated the Act. I believe that it does and so hold. The discussion underway between Hugo Martinez and Valladares at the time of Martha Martinez' approach had to do with generalizations about the group delegation, an item of interest for employees at the facility but not a direct solicitation of support toward success in the Union eventually winning bargaining rights. For this reason Martha Martinez' command, brief as it was, sufficiently restrained the participating employees in their right to engage in simple conversation while at work and without impact on fulfillment of their assigned duties. As such it was tantamount to an overly broad solicitation rule, and thus unlawfully restrictive of Section 7 rights available to employees. Cf. *Arthur Young & Co.*, 291 NLRB 39 (1988); *Pacesetter Corp.*, 307 NLRB 514 (1992).

In a recent case of much greater complexity than the limited circumstances here, the Board found a violation of the Act where employees of a certain department were forbidden to use a general breakroom stemming from that employer's motivation to inhibit union activities. *Miller Group*, 310 NLRB 1235 (1993). Direct comparison cannot be made because presence in a breakroom would ordinarily be on nonworking time, as opposed to the late morning circumstances of the Hugo Martinez-Valladares' conversational exchange. However an analogy is still apparent in that casual discussion between employees while engaged in their work duties is a common part of the employment culture absent some special

reasons that it be scrupulously avoided. In this sense then, the verbal stricture done so abruptly by Martha Martinez was abuse of rights existing for employees as an active organizing campaign for collective-bargaining goals is underway at their concentrated site of employment. I am persuaded that this abuse arises to the level of a committed unfair labor practice under circumstances in existence at the time, and without the slightest explanation from Martha Martinez to either involved employee as to why Respondent would assert that such interference with the ordinary was so urgent. Although mindful of the allowance set forth in Section 8(c) of the Act, I adopt this reasoning because, in part, the employer announced to employees its firm intention to ''fight . . . union participation in there . . . to the limits.'' Furthermore, the Hugo Martinez-Valladares' exchange was routine and unobtrusive as well as comporting with normal use of the area in which it was conducted. Thus, as the General Counsel contends, some support for the conclusion I reach may be found in *Brunswick Food & Drug*, 284 NLRB 663 (1987), even noting that a more extensive and animated fact situation was involved there. Finally, the statement by Martha Martinez constituted sudden promulgation of an unduly broad no-solicitation rule, given that credited evidence shows her edict applied to discussion of the Union generally within the building and made no distinction between working and nonworking time.

## CONCLUSIONS OF LAW

1. Respondent Marriott Corporation is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. Hospital and Service Employees Union Local 399, Service Employees International Union is a labor organization within the meaning of Section 2(5) of the Act.

3. By prohibiting employees from wearing union insignia on their attire, Respondent has engaged in, and is engaging in, unfair labor practices within the meaning of Section 8(a)(1) of the Act.

4. By interrogating employees about conversations among union representatives and employees, Respondent has engaged in, and is engaging in, unfair labor practices within the meaning of Section 8(a)(1) of the Act.

5. By verbally promulgating an overly broad no-solicitation rule against talking among employees while at work, Respondent has engaged in, and is engaging in, unfair labor practices within the meaning of Section 8(a)(1) of the Act.

6. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

## REMEDY

Having found that the Respondent violated Section 8(a)(1) of the Act, I shall order that it cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act. Specifically, I shall order that Respondent cease and desist from restricting employees' wearing of union-related buttons or insignia on their attire, and post an appropriate notice.

[Recommended Order omitted from publication.]